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Plaintiffs sue Defendants ROYAL BANK OF CANADA, RBC CAPITAL MARKETS CORPORATION (incorrectly named and sued as "RBC WEALTH MANAGEMENT COMPANY, formerly RBC DAIN RAUSCHER, INC."), and THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEVEN BENHA YON,

Plaintiff.

V.

ROYAL BANK OF CANADA, a Canadian company, business form unknown; RBC WEALTH MANAGEMENT COMPANY, formerly RBC DAIN RAUSCHER, INC., business form unknown; THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN, formerly known as RBC Dain Rauscher Wealth Accumulation Plan; and, DOES 1 through 20,

Defendants.

Case No. CV08-06090 FMC(AGRx)

**DEFENDANTS' SUPPLEMENTAL
REPLY BRIEF REGARDING
PLAINTIFF'S CLAIM FOR
BENEFITS UNDER THE ROYAL
BANK OF CANADA US WEALTH
ACCUMULATION PLAN**

DJ: Florence-Marie Cooper
Courtroom: (Roybal) 750
MJ: Alicia G. Rosenberg
Courtroom: (Spring) 23

Discovery Cut-Off: September 30, 2009
Pre-trial Conference: January 25, 2010
Trial: February 16, 2010

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1 **I. PRELIMINARY STATEMENT**

2 In accordance with this Court's August 10, 2009 Order On Plaintiff's Ex Parte
 3 Application And Amended Briefing Schedule, Defendants Royal Bank of Canada,
 4 RBC Capital Markets Corporation (incorrectly named and sued as "RBC Wealth
 5 Management Company, formerly RBC Dain Rauscher, Inc.."), and The Royal Bank
 6 of Canada US Wealth Accumulation Plan (collectively "Defendants") hereby submit
 7 their Supplemental Reply Brief in support of their Motion for Partial Summary
 8 Judgment On Plaintiff's Claim For Benefits Under The Royal Bank of Canada US
 9 Wealth Accumulation Plan (the "Motion").

10 Defendants previously filed a reply brief in support the Motion on August 5,
 11 After that brief was filed, this Court issued its August 10, 2009 Order, which
 12 amended the briefing schedule for the ERISA portion of the case and provided that
 13 Defendants' reply brief would be due September 28, 2009, rather than August 5,
 14 2009, as previously set by the Court.

15 Defendants' reply brief filed on August 5, 2009 addresses those matters raised
 16 in Plaintiff's Opening Brief filed on July 22, 2009. To avoid needlessly expanding
 17 the record, this brief will be limited to addressing developments in this litigation
 18 since that brief was filed which may be relevant to the Court's decision on the
 19 Motion. Defendants respectfully refer the Court to their prior submissions in support
 20 of the Motion for all matters not addressed herein.

21 **II. DEFENDANTS' STYLED THEIR OPENING BRIEF AS A MOTION
 FOR SUMMARY JUDGMENT OUT OF AN ABUNDANCE OF
 CAUTION AND TO AVOID ANY PREJUDICE TO PLAINTIFF.**

22 After Defendants filed their reply brief, this Court issued its August 10, 2009
 23 Order stating that Defendants had ignored the Court's May 4, 2009 Minute Order by
 24 filing a motion for summary judgment rather than an Opening Brief on the question
 25 of ERISA benefits. Defendants never intended to disregard this Court's directions
 26 and were in fact attempting to comply with those directions in good faith. Based on
 27 the May 4, 2009 Minute Order, Defendants understood that the Court had requested
 28 the

1 briefing from the parties which would resolve “the ERISA portion of the case.”
 2 Defendants further believed that, if that portion of the case were resolved in their
 3 favor, they would be entitled to judgment on Plaintiff’s claim for benefits under the
 4 Royal Bank of Canada U.S. Wealth Accumulation Plan (the “WAP”) and wished to
 5 make an affirmative request for such relief. Arguably then, Defendants’ opening
 6 brief would be, in substance, a dispositive motion regarding that claim to which the
 7 requirements of Federal Rule of Civil Procedure 56 and Local Rules 56-1 through
 8 56-4 might conceivably apply. Hence, out of an abundance of caution, and to avoid
 9 any possible waiver of its right to judgment should the Court resolve the ERISA
 10 portion of the case in its favor, Defendants styled their opening brief as a motion for
 11 partial summary judgment and submitted the supporting documents required for the
 12 Court to rule on such a motion.

13 Defendants viewed this approach as a conservative one which could not
 14 possibly prejudice Plaintiff. Styling their opening brief as a motion for partial
 15 summary judgment would not require Plaintiff to meet any unanticipated legal issues
 16 or evidence, since the Court had already announced that these briefs would fully
 17 resolve the merits of Plaintiff’s claim for benefits under the WAP. Moreover, given
 18 that these briefs were intended to resolve the ERISA portion of the case, Plaintiff
 19 was already required to make the necessary showing to prevail on the merits, which
 20 is more than the showing that would be required to defeat a motion for summary
 21 judgment. Additionally, since Plaintiff had already enjoyed more than four months
 22 to conduct discovery, he had more than sufficient opportunity to develop whatever
 23 evidence he felt he needed to make this showing. Finally, the stipulated briefing
 24 schedule allowed Plaintiff two weeks to prepare his responsive brief, more than the
 25 time provided under the Federal Rules of Civil Procedure or the Local Rules of this
 26 Court to oppose a motion for summary judgment. Consequently, a motion for partial
 27 summary judgment would not impose any burdens on Plaintiff that he was not
 28 already required to meet and he would not be unduly prejudiced if Defendants

1 proceeded in this manner.

2 Based on the Court's August 10, 2009 Order, Defendants now understand that
 3 the Court wished to resolve the ERISA portion of the case by way of briefing, but
 4 without resort to the usual procedures for obtaining summary judgment. Defendants
 5 apologize for any confusion they have created by their earlier misunderstanding and
 6 have complied with the provisions of that Order. Moreover, Defendants have no
 7 objection should the Court wish to conduct a court trial of Plaintiff's claim for
 8 benefits under the WAP based on the existing court record, in the manner provided
 9 in *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094-95 (9th Cir. 1999).

10 **III. THE FURTHER DISCOVERY CONDUCTED BY PLAINTIFF AFTER
 THIS COURT'S AUGUST 10, 2009 ORDER DOES NOT AFFECT THE
 COURT'S RULING ON THE ERISA PORTION OF THE CASE.**

11 In its August 10, 2009 Order, this Court granted Plaintiff leave to take the
 12 deposition of Gabriela Sikich. Defendants complied and the deposition was
 13 completed on August 28, 2009. At the deposition, Defendants also produced 290
 14 pages of documents at the deposition, in response to various Requests for Production
 15 included with the Notice of Deposition. During this period, Defendants also
 16 responded to Plaintiff's Special Interrogatories (Set Two) and provided Plaintiff with
 17 unredacted versions of 43 pages previously produced in redacted form. No other
 18 discovery has taken place since the Court issued its August 10, 2009 Order.

19 While Plaintiff may offer some of the testimony, documents and/or responses
 20 obtained from this discovery for the Court's consideration, none of it has any bearing
 21 on the issues the Court must decide at this juncture. The ERISA portion of this case
 22 is a straight-forward claim by Plaintiff that he was improperly denied benefits under
 23 the WAP, which both sides have agreed to treat as a pension plan subject to ERISA
 24 for purposes of this Motion. Whether an employee is entitled to benefits under an
 25 ERISA plan "stands or falls by the terms of the plan." *Kennedy v. Plan Adm'r for*
 26 *DuPont Sav. and Inv. Plan*, ____ U.S. ____ 129 S.Ct. 865, 875 (2009) (internal
 27 quotation marks and citation omitted). Thus, if the provisions of the WAP are

1 unambiguous, which they are, then Plaintiff's claim must be rejected, and any
 2 argument that those terms are somehow unreasonable or were set up "in bad faith" is
 3 simply irrelevant. *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140,
 4 149 (2d. Cir. 1999) ("As a general matter, unambiguous language in an ERISA plan
 5 must be interpreted and enforced in accordance with its plain meaning"); *Carr v.*
 6 *First Nationwide Bank*, 816 F.Supp. 1476, 1493 (N.D.Cal.,1993 (where plan
 7 language is unambiguous, its natural meaning is conclusive). Specifically, any
 8 appeal to fiduciary duties misses the mark, since an ERISA plan administrator is
 9 bound to pay benefits in accordance with the terms of the plan, and any departure
 10 from those terms would constitute a breach the administrator's statutory duties.
 11 *Kennedy*, ____ U.S. ____, 129 S.Ct. at 875. Hence, to adjudicate Plaintiff's claim,
 12 this Court need only review the terms of the WAP plan document (specifically
 13 Section 4), which is already in evidence, and apply them to the undisputed facts
 14 concerning the date of Plaintiff's termination and the vested status of his WAP
 15 benefits on that date. Any further evidence Plaintiff may offer cannot change the
 16 clear result that the benefits he seeks were forfeited because his employment with
 17 Defendants ended before those benefits vested.

18 Any further evidence Plaintiff may offer is unavailing even if the Court finds
 19 that the relevant terms of the WAP are ambiguous or that factual determinations are
 20 required before those terms can be applied to Plaintiff's circumstances. Since the
 21 WAP confers discretion on the WAP Committee to administer claims – a point
 22 Plaintiff does not dispute – its decision on these matters is reviewable in court only
 23 for an abuse of discretion. *Abatie v. Alta Life & Health Ins. Co.*, 458 F.3d 955, 965
 24 (9th Cir. 2006). Such review, moreover, is limited to the administrative record which
 25 the plan administrator had before it at the time the decision was made. *Id.* at 970.
 26 That record has already been introduced into evidence and authenticated, and
 27 nothing obtained in subsequent discovery alters its scope. Thus, any additional
 28 evidence Plaintiff may offer in connection with his reply brief would be evidence

1 that was not part of the administrative record, which this Court cannot consider to
 2 determine Plaintiff's entitlement to the benefit he seeks. *Id.*

3 Nor can Plaintiff escape the bar on evidence outside the administrative record
 4 by suggesting that the evidence he has obtained is somehow relevant to demonstrate
 5 that the WAP Committee acted under a conflict of interest. While a court may
 6 consider evidence outside the administrative record for this limited purpose, *see id.*,
 7 the goal of such inquiry is only to determine "the degree to which the conflict
 8 appears improperly to have influenced a plan administrator's decision." *Montour v.*
Hartford Life & Accident Ins. Co., ___ F.3d ___, 2009 WL 2914516 at *5. Here,
 10 however, there is no evidence of any such improper influence. To the contrary, Ms.
 11 Sikich testified both in her declaration submitted with Defendants' reply papers and
 12 at deposition that none of the members of the WAP Committee responsible for
 13 deciding Plaintiff's entitlement to benefits under the WAP (i) were employed by the
 14 entity responsible for paying those benefits, or (ii) were aware of the financial
 15 consequences of their decision. (Second Decl. of G. Sikich In Support Of
 16 Defendants' Motion for Partial Summary Judgment [dkt. # 39-2] at 2:4-13; Sikich
 17 Depo.¹ at 45:17-47:22, 59:9-60:20 & 61:24-63:7.) Discovery, moreover, has not
 18 revealed any evidence that these decision-makers failed to follow established
 19 procedures in considering Plaintiff's claim, disregarded or downplayed materials
 20 submitted by Plaintiff, or gave undue weight to opposing evidence. Thus, there are
 21 no facts or circumstances suggesting that a conflict of interest tainted the
 22 administrative decision-making process and no reason to conclude that an abuse of
 23 discretion occurred.

24 Finally, any further evidence Plaintiff may offer pertaining to the WAP's top-
 25 hat status is irrelevant since the same framework applies to the judicial review of a
 26 claim for benefits "for all covered plans, top hat or otherwise." *Sznewajs v. U.S.*

27 ¹ The relevant excerpts of the Deposition of Gabriela Sikich are attached as
 28 Exhibit A to the Second Declaration of Christopher W. Decker In Support Of
 Defendants' Motion For Partial Summary Judgment, filed concurrently herewith.

1 *Bancorp Amended and Restated Supplemental Benefits Plan*, 572 F.3d 727, 734 (9th
 2 Cir. 2009). Specifically, a participant's entitlement to benefits is determined solely
 3 by the terms of the plan document and the plan administrator's decision is
 4 reviewable only for an abuse of discretion. *Id.* at *passim*. Indeed, the only difference
 5 between the two types of plans which Plaintiff has suggested may affect the outcome
 6 of this litigation is that the administrators of ERISA plans (other than top-hat plans)
 7 are subject to ERISA fiduciary duty rules. However, as explained above, that
 8 difference is immaterial here, since, in reviewing a claim for benefits, ERISA plan
 9 administrators must exercise their fiduciary duties *in accordance with the terms of*
 10 *the plan document*. See, e.g., *Kennedy*, ____ U.S. ___, 129 S.Ct. at 875.
 11 Accordingly, in this instance, the analysis of Plaintiff's claim for benefits is the same
 12 regardless of whether the WAP is a top-hat plan or not, and the Court need not even
 13 resolve whether the WAP falls within the top-hat plan exemption.

14 **IV. THE COURT SHOULD DISREGARD PLAINTIFF'S OBJECTIONS TO**
 15 **THE SECOND DECLARATION OF GABRIELA SIKICH.**

16 The Court's briefing schedule for the ERISA portion of the case provided that
 17 the parties would submit *simultaneous* opening and reply briefs, which necessarily
 18 forecloses either side from responding to the other's second submission.
 19 Nonetheless, after Defendants filed their reply papers on August 5, 2009, which
 20 included the Second Declaration of Gabriela Sikich In Support Of Defendant's
 21 Motion For Partial Summary Judgment, Plaintiff filed evidentiary objections to that
 22 declaration. This Court should disregard the objections since they exceed the scope
 23 of the briefing requested by the Court.

24 In any event, Plaintiff's objections are without merit. Plaintiff objects that Ms.
 25 Sikich is "wholly unqualified to render any testimony as to the administration,
 26 management, or operation of the WAP Committee" because she is not a member of
 27 that committee. (Pl.'s Obj. to Second Decl. of G. Sikich [dkt. # 41] at 2:14-2:28.)
 28 However, Ms. Sikich does not testify to any of these matters in her Second

1 Declaration, but only provides information regarding the percentage of Defendants' workforce eligible to participate in the WAP, the average compensation of those eligible to participate and Defendant's workforce generally, and the membership of the WAP Committee. She further testifies in her declaration that this information is based on her own personal knowledge or her review of Defendants' business records, establishing the necessary foundation for that testimony and an exception to the hearsay rule. (Second Decl. of G. Sikich [dkt. # 39-2] at 1:5-8.)

2 Plaintiff further objects to paragraphs 6-8 of the Ms. Sikich's Second Declaration on the grounds that her testimony regarding the contents of Defendants' business records constitutes hearsay, violates the best evidence rule and is given without adequate personal knowledge. However, Ms. Sikich is not attempting to establish the contents of those records, but is rather relying on them to establish certain facts regarding the percentage of employees eligible to participate in the WAP, their average compensation, and the average compensation of Defendants' workforce generally. Since those business records qualify for an exception to the hearsay rule, Ms. Sikich may rely on them to establish the facts which they describe. Her personal knowledge of the contents of these records is provided by her own testimony in the declaration. (Second Decl. of G. Sikich [dkt. # 39-2] at 1:12-18.)

3 Finally, Plaintiff objects that Ms. Sikich's Second Declaration improperly introduces new evidence not presented at the time of Defendant's opening brief. 4 However, the facts in Ms. Sikich's Second Declaration respond directly to the arguments advanced by Plaintiff in his opening brief, specifically that (i) the WAP is 5 not a top-hat plan because participation is not limited to a select group of management or highly compensated employees, and (ii) the members of the WAP 6 Committee who decided Plaintiff's claim for benefits had a financial incentive to 7 deny that claim. Accordingly, the declaration is proper as a rebuttal of the evidence 8 offered by Plaintiff in connection with his opening brief.

1 V. **CONCURRENTLY HEREWITH, DEFENDANTS ARE FILING AN
2 AMENDED SECOND DECLARATION OF GABRIELA SIKICH TO
3 CORRECT A COMPUTATIONAL ERROR IN THE DOCUMENT
4 PREVIOUSLY FILED WITH THE COURT.**

5 After completing their filing on August 5, 2009, Defendants became aware
6 that the Second Declaration of Gabriela Sikich filed concurrently with Defendants'
7 reply papers contained a computational error. Specifically, the average annual
8 compensation of WAP-eligible employees in WAP plan years 2003 through 2007
9 had been understated. The corrected numbers are provided in the Amended Second
10 Declaration of Gabriela Sikich In Support Of Defendants' Motion For Partial
11 Summary Judgment On Plaintiff's Claim For Benefits Under The Royal Bank Of
12 Canada U.S. Wealth Accumulation Plan, which is being filed concurrently herewith.

13 In its reply papers, Defendants relied on the incorrect data only to support their
14 argument that WAP participants qualify as "highly-compensated employees"
15 because they earn at least twice the average for Defendants' employees generally and
16 in excess of \$100,000 per year. (Defs.' Reply Memo. [dkt. # 39] at 5:17-6:9.) Since
17 this is all the more true based on the corrected data, the error in the data previously
18 provided is not material.

19 Defendants served the Amended Second Declaration of Gabriela Sikich on
20 Plaintiff on August 25, 2009, in advance of the deposition of Ms. Sikich. (See
21 Amended Second Declaration of G. Sikich, filed concurrently herewith, at 2.) Thus,
22 Plaintiff has had a full opportunity to inspect the amended declaration and examine
23 Ms. Sikich regarding its contents. Consequently, Plaintiff has not been prejudiced by
24 the error or subsequent correction.

25 VI. **CONCLUSION**

26 For all foregoing reasons, in addition to those set forth in the papers previously
27 filed by Defendants on July 22, 2009 and August 5, 2009, this Court should
28 adjudicate Plaintiff's claim for benefits under the WAP in favor of Defendants and
 enter judgment accordingly.

1 DATED: September 28, 2009

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5 OGLETREE, DEAKINS, NASH, SMOAK
6 & STEWART, P.C.
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11 By: /s/ Christopher W. Decker

12 Christopher W. Decker

13 Attorneys for Defendants

14 ROYAL BANK OF CANADA, RBC
15 CAPITAL MARKETS CORPORATION
16 (incorrectly named and sued as "RBC
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